Supreme Court
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No. 97-1173

In The

Supreme Court of the United States

October Term, 1997

TOM BATES, ET AL.,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CONSTITUTIONS:

U.S. Constitution Art. I, § 3, cl. 1, *amended by* U.S. Const. amend. XVII, § 1 3

Nothing in the oppositions to the Petition for a Writ of Certiorari can negate the importance of this case to the voters of California and of the several states. Simply put, Californians cannot vote for the candidates of their choice, not because they or the candidates have done anything wrong, not because California has demonstrated a compelling need to restrict their franchise, and not because California has demonstrated that its restrictions are narrowly tailored to achieve a compelling state interest. Californians cannot vote for the candidates of their choice because the Ninth Circuit Court of Appeals has decided that California's extraordinarily restrictive lifetime ban on further legislative service does not impose a severe burden on the right to vote and therefore fails to require the strict scrutiny that this Court has brought to bear on so many lesser restrictions.

That decision, with respect, is fundamentally at odds with this Court's serious and scholarly discussion of the impact of term limits in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), a decision that repeatedly recognized the fundamental democratic principle that "the people should choose whom they please to govern them."[1] Contrary to the Secretary of State's claim, petitioners do not argue for an interpretation of *U.S. Term Limits, Inc. v. Thornton* that would "invalidate *any* qualification for state or local office. . . . "[2] We argue simply that *U.S. Term Limits* demonstrates that term limits *do* impose a severe burden on voting rights, a burden that required the

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[1] *Id.* at 819 (internal quotation marks omitted); *see* Petition for a Writ of Certiorari at 8-9.

[2] Brief of Respondent Jones at 4 (emphasis in original).

Ninth Circuit to apply the test enunciated in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Had the Ninth Circuit heeded *U.S. Term Limits* and applied strict scrutiny, California's unnecessarily oppressive lifetime ban would have fallen.

Both Secretary of State Jones and respondents Schabarum and Uhler cite *Gregory v. Ashcroft*, 501 U.S. 452 (1991), for the proposition that California's lifetime ban on legislative service is constitutional. In *Gregory*, this Court rejected the argument that Missouri's seventy-year mandatory retirement age for judges violated the Age Discrimination in Employment Act and the Equal Protection Clause. Although the issue of voting rights was not raised, the Court noted that the states had the power to determine the "qualifications" of their state officers. *Id.* at 460.

In *Chandler v. Miller*, ___ U.S. ___, 117 S. Ct. 1295 (1997), however, this Court explained the significance of *Gregory*. *Chandler* involved a Fourth Amendment challenge to a Georgia requirement that candidates for certain state offices undergo drug testing. Georgia argued that *Gregory* required the Court to give special deference to Georgia's plan because it "implicate[d] Georgia's sovereign power . . . to establish qualifications for those who seek state office." 117 S. Ct. at 1302. Rejecting that argument, this Court explained the limits of *Gregory*:

> States, *Gregory* reaffirmed, enjoy wide latitude to establish conditions of candidacy for state office, but in setting such conditions, they may not disregard basic constitutional protections.
>
> *Id.*

The mere invocation of state sovereignty, therefore, cannot serve as a justification for severely burdening the right to vote, anymore than it could permit Tennessee to dilute the voting power of its citizens more than thirty-five years ago. *Baker v. Carr*, 369 U.S. 186 (1962). Like Tennessee, California had to move from a county-based system to an evenly apportioned Senate. *Jordan v. Silver*, 381 U.S. 415 (1965). It did so despite the fact that under the federal constitution United States Senators are elected two per state. U.S. Const., art. I, § 3, cl. 1, *amended by* U.S. Const. amend. XVII, § 1. *Baker v. Carr* thus also answers the claim of respondents that term limits must surely be permissible because the Twenty-second Amendment imposes them on American Presidents. Brief of Respondent Jones at 3. Like the election of United States Senators, the Twenty-second Amendment is *sui generis* and is beyond the reach of the First Amendment. California's term limits are not.

Respondents also argue that this Court's order in *Moore v. McCartney*, 425 U.S. 946 (1976), dismissing a West Virginia term limits appeal for want of a substantial federal question, disposes of the instant petition. Brief of Respondent Jones at 2; Brief of Respondents Schabarum and Uhler at 7. *Moore*, however, presented a challenge to a consecutive ban on executive service (*State ex rel. Maloney v. McCartney*, 223 S.E.2d 607 (1976)), as opposed to the lifetime ban on legislative service, and it predates this Court's decisions in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) and *Burdick v. Takushi*, 504 U.S. 428 (1992).

Finally, respondents also suggest that this Court's denial of certiorari in *Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309 (1991), *cert. denied*, 503 U.S. 919 (1992), should

guide the Court's decision on the instant petition. The circumstances today, however, are far different. Federal and state courts have had six years of experience with the issue and this Court's decisions in *Burdick* and *U.S. Term Limits* have provided much of the conceptual groundwork for dealing with the particular conflict between the right to vote and the right of states to order their government. In *Eu*, there was no factual record and nothing but speculation as to the effect of term limits. Here, the actual impact of term limits was the subject of a six-day trial below and the subject of substantial findings of fact. *Bates v. Jones*, 958 F. Supp. 1446 (N.D. Cal. 1997), App. 146-200. The issue is now ripe for decision and this is the case in which it should be decided.

Dated: February 20, 1998

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